UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

P.J. ROSALY ENTERPRISES, INC. d/b/a ISLANDWIDE EXPRESS And UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	Cases 12-CA-218464 12-CA-219677 12-CA-221809

MEMORANDUM IN SUPPORT OF ISLANDWIDE'S MOTION FOR SUMMARY JUDGEMENT

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Comes now, **P.J. ROSALY ENTERPRISES, INC. d/b/a ISLANDWIDE EXPRESS (IWE)** through its undersigned attorneys and subject to the rights granted by the Board's Rules and Regulations very respectfully states and prays as follows in support of its summary judgment motion:

I. INTRODUCTION

On August 31, 2018 the Regional Director issued "Order Consolidating Cases, Consolidated Complaint and Notice of Hearing" against IWE. Subsequently, IWE filed its Answer to the Complaint and Amended Answer to the Consolidated Complaint on November 13, 2018, as agreed with the Regional Director.

The hearing is scheduled to begin on February 5, 2019. As the undisputed facts and evidence in this case demonstrate there are no genuine issues of material facts that warrant the continuation of this case and therefore summary judgement should be issue in favor of IWE.

II. STATEMENT OF UNDISPUTED FACTS

1. IWE is a Puerto Rico corporation with offices and place of business in Guaynabo, Arecibo, Ponce, Caguas and San Juan, Puerto Rico that has been engaged in the business of pick-up and delivery of correspondence and merchandise. **(Paragraph 2(a) of the Consolidated Complaint).**

2. The Union de Tronquistas Local 901, affiliated to the IBT (Union) has been the exclusive representative of the following employees of IWE: "All full time and part time parcel pick up and deliver chauffeurs, warehouse employees, warehouse clerks, cashiers and customer service employees employed by IWE throughout Puerto Rico". **(IWE's Amended Answer to the Consolidated Complaint, paragraph 5(a))**

3. Since March 30, 20106 the Union has been the exclusive representative of the Unit **(Paragraph 5(c) of the Consolidated Complaint).**

4. The parties signed a Collective Bargaining Agreement on October 1, 2012. The same was effective until September 30. 2017 (paragraph 5(c) of the Consolidated Complaint)

5. This agreement was later modified through a *Stipulation* signed on August 24, 2016 which extended the effectiveness of the collective bargaining agreement until September 30, 2019 **(IWE's Amended Answer to the Consolidated Complaint, paragraph 5(c))**

6. On September 28th, 2016 IWE was forced to file a reorganization petition under Chapter 11 of the Federal Bankruptcy Code before the Federal Bankruptcy Court for the District of Puerto Rico; Case no. 16-076690 **(Exhibit 1)**

7. IWE filed the petition jointly with Islandwide Logistic, Inc., and HME Holdings, Inc. On their bankruptcy schedule, the three entities as a whole had assets totaling approximately $1,240,000 and liabilities totaling approximately $9,500.00. They listed three secure creditors with claims totaling almost $3,000,000 and more than 300 unsecured creditors holding claims totaling over $6,500.00. (**Exhibit 2, pg. 3)**

8. At the time of the filing of the chapter 11 petition IWE had 188 employees of which 160 were members of the Union. Thus, it is unequivocally that the unit employees are essential to IWE's operations (**Exhibit 1**)

9. The cost of the collective bargaining agreement was the higher operational costs IWE had. Therefore, in order for the Plan to be approved by the Court, modifications to the collective bargaining agreement had to be negotiated with the union to avoid a conversion to a Chapter 7 ruling by the Court. (**Exhibits 1 and 2**)

10. Since November 2016 through the end of March 2017 IWE tried to bargain with the union the much-needed modifications to the CBA (**Exhibits 1 and 2**)

11. On March 28, 2017, the Union without "good cause" rejected ALL of the proposals made by IWE, leaving IWE with no other alternative than to seek the rejection of the CBA under the provisions of Section 1113 of the Federal Bankruptcy Code (Section 1113). **(Exhibit 3)**

12. As part of the Bankruptcy proceedings on August 10, 2017 the Union requested IWE the contract and all documentation related to their client, Cardinal, among other information regarding other clients **(Exhibit 4)**

13. Since the contract and documentation requested by the Union on August 10, 2016 was confidential information IWE required that the Union signed a *Confidentiality Agreement* to provide them the same (**Exhibit 4**)

14. IWE is the only Puerto Rican courier service provider in an extremely competitive industry, dominated by UPS, USPS, Fed-Ex, DHL and other large American companies. In this industry a $0.01 can be the difference between retaining a client or losing it, because the contracts are mostly based on volume (**Exhibit 4**)

15. The execution of the confidential agreement was an essential requirement of IWE since the Union represents employees of IWE's competitors and the information requested included terms and conditions of the services provided by IWE to Cardinal and other clients which could be use by their competitors to negotiate with IWE's clients (**Exhibit 4**)

16. The Union never signed the confidentiality agreement nor replied to IWE's multiple requests to provide the same (**Exhibit 4**).

17. On August 18, 2017 IWE made available to the Union the list of all its clients for the years 2015, 2016 and 2017, including Cardinal. The review and inspection of this list was subject to the prior execution of the Confidentiality Agreement, which the Union refused to sign (**Exhibit 4**)

18. On September 1, 2017, IWE filed "Urgent Motion Requesting Protective Order and Requesting Urgent Hearing" **(Exhibit 4).**

19. The Union filed before the Bankruptcy Court a Motion to Compel (**Exhibit 5)**

20. On November 8 and 9, 2017 the Court held an evidentiary hearing to consider:

    a. IWE's motion seeking rejection of the CBA **(Exhibits 1 & 6)**
    b. IWE's Urgent Motion Requesting Protective Order and **(Exhibits 1 & 6)**
    c. The Union's Motion to Compel (**Exhibits 1 & 6)**

21. At the beginning of the November 8th evidentiary Hearing the Court allowed each party the opportunity to argument and submit evidence as to IWE's "Motion Requesting Protective Order" and the "Union's Motion to Compel" **(Exhibit 6, November 8th Hearing Transcript and Exhibit 1)**

22. The Court denied the Union's Motion to Compel as to the information of Cardinal and IWE's other clients, due to the reasons set forth by IWE in its "Urgent Motion Requesting Protective Order" (**Exhibit 6)**

23. Moreover, the list of IWE's clients and general revenues from the services provided to this client were included in IWE's Joint Plan submitted on April 27, 2017 **(Exhibit 7, IWE's Joint Plan)**

24. The Union as creditor had access to the Joint Plan (**Exhibit 2)**

25. The Court asserted its exclusive jurisdiction under 28 USC section 157(b)(1) and section 1334(b) and Section 157 (b)(2)(A) and (O) and on November 8 and 9th held the evidentiary hearing regarding IWE's *Motion Requesting Rejection of Collective Bargaining Agreement with Union de Tronquistas*". The hearing was held before Honorable Judge Honorable Enrique S. Lamoutte of the United States Bankruptcy Court of the District of Puerto Rico **(Exhibit 1, pg. 3)**

26. During the Hearing each party presented evidence as to the appropriateness of the CBA rejection (**Exhibits 1 and 6)**

27. On December 7th, 2017 the Bankruptcy Court for the District of Puerto Rico rejected the collective bargaining agreement pursuant to section 113 of the Bankruptcy Code, 11 USC section 1113 **(Paragraph 6(a) of the Consolidated Complaint and Exhibit 1).**

28. Section 1113 of the Federal Bankruptcy Code allows a debtor to assume or reject a collective bargaining agreement, provided it complies with the following nine (9) requirements: **(Emphasis supplied) (Exhibit 1)**

    a. The Debtor must submit a proposal to the Union to modify the collective bargaining agreement;

    b. The proposal must be based upon the most complete and reliable information available at the time of such proposal;

    c. The proposal modifications must be necessary to allow the reorganization of the Debtor;

    d. The proposed modifications must assure that all creditors, the Debtor, and all affected parties are treated fairly and equitably;

    e. The Debtor must provide the Union such relevant information as is necessary to evaluate the proposal;

    f. Between the time of making the proposal and the time of the hearing, on approval or rejection of the existing collective bargaining agreement, the Debtor must meet at reasonable times with the Union;

    g. At meetings with the Union the Debtor must confer in **good faith** attempting to reach mutually satisfactory modifications of the collective bargaining agreement;

h. The Union must have refused to accept the proposal **without good cause**; and;

i. The balance of equities must clearly favor rejection of the collective bargaining agreement.

29. The Court applied the nine (9) factors of Section 1113 and concluded in its *Opinion and Order* that: "*The court finds on the evidence before it, that the Debtor*[1] *has complied with the Section 1113's requirements.* ***The Debtor has shown that it satisfied the nine-factor test****. Accordingly, the Debtor's Motion Requesting Rejection of the Collective Bargaining Agreement with the Union de Tronquistas is hereby granted*" (**Exhibit 1, Emphasis supplied**)

30. In its Opinion and Order the Court in the application of the 9 factors held that:

a. As to the requirement that the "*Debtor must make a proposal to the Union to modify the Collective Bargaining Agreement*". The court held: "The Union does not contest the Debtor's compliance with this requirement. (**Exhibit 1, Pg. 9)**

b. As to the requirement that ***"****The proposal must be based on the most complete and reliable information available at the time of the proposal*" the court held that: "Furthermore, although the Union disagrees with the quarter chosen by CPA Barroso to calculate economic impact of several clauses, it failed to present any counter-evidence. As a result, the court concludes that the Debtor complied with the second requirement. (**Exhibit 1, Pg. 11**)

c. As to the requirement that ***"****The modifications must be necessary to permit reorganization of IWE"* the Court held: **(Exhibit 1)**

i. *The court notes that some of the clauses included in the Debtor's proposal do not relate to wages and benefits. Notwithstanding, the court finds that they have significant economic impact on the debtor's operation*. (**Exhibit 1, Pg. 16**)
ii. The Union made several allegations related to the Debtor's financial condition but did not present any evidence to contradict the Debtor's evidence regarding the impact of the propose modifications to the CBA on the cash flow. (**Exhibit 1, Pg. 16**)
iii. The forecasted statements of cash flow, both the original versions and the updated versions, show that the Debtor cannot afford the cost of the CBA as is. (**Exhibit 1, Pg. 16**)
iv. The court finds that the proposed modifications are necessary based on the uncontroverted evidence provided by the Debtor and the testimony of expert witness CBA Barroso. (**Exhibit 1, Pg. 16**)

[1] Debtor is IWE

d. As to the Union 's allegation that IWE failed to include a *snap-back* provision as it requested, the court found that:

   i. The failure to include a "snap-back" provision is not fatal to the Debtor's request to reject a collective bargaining agreement pursuant to Section 1113. The Court explained that a "snap-back" provision restores some or all of the concessions required by the proposal in the event that a debtor's financial condition improves. (**Exhibit 1, Pg. 18**).
   ii. There is no doubt that the Union has made concessions and sacrifices in order to assist the Debtor. However, the evidence shows that the other parties in interest are also sharing in this burden.
   iii. Accordingly, the Court finds that the Debtor's proposal is fair and equitable. (**Exhibit 1, Pg. 18**)

e. As to the requirement that "*IWE must provide to the Union such relevant information as is necessary to evaluate the proposal*". The court held, as previously mentioned, that: "*The court finds that the Debtor has provided the Union the necessary information for them to evaluate the proposal*". [2](**Exhibit 1, Pg. 19**)

f. As to the requirements that "*Between the time of making the proposal and the time of the hearing, on approval or rejection of the existing collective bargaining agreement, the Debtor must meet at reasonable times with the Union"* the court held: "The court will not expand on this requirement **as the record reflects Debtor's compliance with the same and the Union agrees that this requirement has been satisfied**". (**Exhibit 1, Pg. 20**)

g. As to the Union allegation that IWE acted in bad faith the court concluded: **(Emphasis Supplied) (Exhibit 1, pg. 20-21)**
   i. "The court has ruled that the Debtor provided sufficient information to allow the Union to evaluate the proposals**.**
   ii. In addition, although the sequence of events in this case is unfortunate, the fact that the Debtor filed for Bankruptcy one month after negotiating a CBA cannot lead to the conclusion it acted in bad faith.
   iii. **Section 1113 gives Debtor the right to file for rejection once a bankruptcy petition is filed under Chapter 11.**
   iv. Additionally, the evidence before the court shows the Debtor engaged in negotiations with its landlord to try to reach an agreement as to a $2.9 million-dollar debt prior to filling the bankruptcy petition. However, this agreement never materialized and was part of the reason why the Debtor filed for bankruptcy. The Debtor's president testified that the 2016 CBA was negotiated in the assumption that the agreement with the landlord would be executed. (**Exhibit 1, Pg. 20-21**).

[2] All the information provide to the Union is mentioned in pg. 18-19 of the Opinion and Order **(Exhibit 3**)

v. The court also concluded that: *"**Moreover, although the Union engaged in negotiations with the Debtor and submitted alternatives, it never submitted a counter-proposal to the Debtor***". (**Exhibit 1, Pg. 21**)
vi. **The evidence before the court shows that the Debtor was willing to negotiate with the Union to try to reach an agreement.** (**Exhibit 1, Pg. 21**)

h. As to the requirement that *"The Union must have refused to accept the proposal **without good cause***", the court held that: **(Emphasis Supplied) (Exhibit 1, pg. 21-22)**

i. **The Union refused to accept the Debtor's proposal**. (**Exhibit 1, Pg. 22**)
ii. **The evidence before the court shows that it is unlikely that the Union would have been willing to accept <u>any</u> proposal from the Debtor**. (**Exhibit 1, Pg. 22**)
iii. Lucas Alturet, a Union service representative, testified that the Union rejected the proposal because it understood it had already negotiated and made substantial concessions in August 2016. (**Exhibit 1, Pg. 22**)
iv. This is further evidenced by the fact that the Union never made a counter-proposal to the Debtor. (**Exhibit 1, Pg. 22**)
v. This court does not dispute that the Union made substantial concessions or minimize the same. However, **<u>the Union could not refuse to compromise once the Debtor filed for Bankruptcy and invoked its rights under section 1113</u>**. (**Exhibit 1, Pg. 22**)
vi. Thus, the **court concludes that the Union did not have "good cause" to reject the proposal.** (**Exhibit 1, Pg. 21**)

i. As to the requirement *"That the balance of the equities must clearly favor rejection of the CBA"*, the Court held:
i. The court has already found that the burden is spread among parties in interest and that the Debtor negotiated in good faith. (**Exhibit 1, Pg. 24**)
ii. "The evidence before the court shows that the debtor will not be able to successfully reorganize if rejection is not permitted. (**Exhibit 1, Pg. 24**)
iii. Thus, the Debtor has satisfied this requirement. (**Exhibit 1, Pg. 24**)

31. The rejection of the CBA was the result of a good faith impasse between the parties due to the Union's refusal to bargain with IWE **(Exhibit 1, pg. 21-22)**

32. The Union appealed the Courts' December 7th, 2017 Opinion and Order before the Bankruptcy Appeal Panel (BAP) in case No. BAP No. PR 17-056 (**Exhibit 2**)

33. The Union did not request a stay of the Court's December 7, 2017 Opinion and Order pending the appellate procedures before the BAP as permitted by the Federal Bankruptcy Code (**Exhibit 2, pg. 6**)

34. Therefore, pursuant to the Federal Bankruptcy Code, the Court's December 7th "Opinion and Order" rejecting the CBA became effective immediately (**Exhibits 2**)

35. On March 28, 2018 the Court confirmed the Joint Plan under chapter 11 dated April 27, 2017 (**Exhibit 2**)

36. The Union did not request a stay of the Plan Confirmation pending the appeal of the December 7, 2017 Order rejecting the CBA **(Exhibit 2)**

37. On March 28, 2018 the Bankruptcy Court in regards to the charges filed by the Union before the NLRB held that: **(Exhibit 8)**

    a. Although the NLRB has jurisdiction to entertain unfair labor practices claims, it **may not seek to execute a money judgement**. (**Exhibit 8, pg. 3**)
    b. That the bankruptcy court does not have the authority to order a chapter 11 debtor, after rejection of the CBA, to make employee Union quota deductions. ***In re San Rafael Baking Co.***; 219 BR (9th Cir. BAP 1998). (**Exhibit 8, pg. 4**)
    c. The court granted the Union's request to negotiate a new CBA and stressed the need to engage in flexible negotiations…. maybe of a limited period to allow economic changes, would be benefit for both parties. (**Exhibit 8, pg. 4**)

38. Moreover, in its March 28, 2018 hearing the Court confirm the following: "**That a review of this court's order, particularly the last paragraph, shows that the court rejected the CBA in its entirety. There were no qualifications, conditions or exceptions**. (**Exhibit 8, pg. 4**)

39. The Union did not appeal nor requested a stay of the Court's decisions included in the "Minute of Entry" of the March 28th, 2018 evidentiary hearing regarding the Union's Motion for Entry **(Exhibit 2)**

40. On April 9th, 2018 the Union send IWE a letter requesting to bargain a new collective bargaining agreement and submitted their proposal of 64 pages. It provided IWE until April 11th, 2018 to begin bargaining, with the expressed threat that if no replied was received by said date, they would file an unfair labor practice charge **(Exhibit 9)**

41. The Union failed to comply with the requirements agreed by the parties on Article XXXIX of the rejected CBA, which required that the party interested in modifying the CBA had to notify the other party in writing by certified mail or by hand their intention to modify the CBA at least 90 days prior to the expiration of the CBA **(Exhibit 9).**

42. The Union sent their bargaining proposal and April 9th letter by email, not certified mail nor was delivered by hand as required **(Exhibit 9)**

43. The union's super short three (3) days' notice to begin bargaining under the threat of unfair labor charges is not the flexible bargaining with extended periods of bargaining ordered by the Court in the March 28, 2018 hearing (**Exhibits 8, pg. 4 & 9)**

44. The Union's April 9th, 2018 letter is an admission that the CBA was no longer in effect and had been terminated **(Exhibit 9)**

45. On April 11th, 2018 IWE send the Union a letter in replied to their September 9th, letter bargaining request. In the same IWE expressed their willingness to commence negotiations of the new collective bargaining agreement provided the Union withdraw their appeal (**Exhibit 10)**

46. On April 12, 2017 the Union send IWE a letter stating that they would withdraw the appeal after the parties sign the new collective bargaining agreement. In their statement the Union recognized the incongruency of their positions. They acknowledged that the result of the pending Appeal would have a direct impact in the validity of a new collective bargaining agreement, especially if the BAP issued a decision in favors of the Union 's request **(Exhibit 11)**

47. The Union did not file a "Motion in Contempt" against IWE in case no. 16-07690 before the Bankruptcy Court for refusing to bargain with the Union **(Exhibit 2)**

48. In April 9th, 2018 the Union also send a letter to IWE with the following request: "For purposes of bargaining, we request all related to the operation of Cardinal and any other new contract" **(Exhibit 12)**

49. In their April 9th letter the Union requested the same information the Bankruptcy Court had concluded that IWE did not had to provide it **(Exhibits 4, 5 & 6)**

50. The April 9th request of information letter was not made in good faith and did not comply with the requirements establish by the Act **(Exhibit 12)**

51. On July 24, 2018 the BAP issued its decision regarding the Appeal filed by the Union regarding the Court's December 7th, 2017 Opinion and Order rejecting the CBA. (**Exhibit 2)**

52. In its decision the BAD granted IWE's Motion to Dismiss the Appeal for Equitable Mootness **(Exhibit 2)**

53. The BAP issued the following undisputed relevant facts:

    a. That the Joint Plan divided creditors and other interest into 13 classes **(Exhibit 2, pg. 3)**.

    b. That Union de Tronquistas de Puerto Rico was a Class 9 creditor, consisting of "any contingent and unliquidated claim that the Union may have, as the same is to be allowed and determined by the Court for the rejection of the collective bargaining agreement. **(Exhibit 2, pg. 3)**

c. That the Joint Plan was based on cash flow projections which did not include the costs associated with the CBA. **(Exhibit 2, pg. 4)**

d. The Union did not seek or obtain a stay of the CBA Rejection Order from either the bankruptcy court or panel **(Exhibit 2, pg. 6)**

e. That the Union's Objections to the Confirmation of the Joint Plan, where the following: That the joint Plan failed to comply with the disclosure requirements of sections 1125 and 1126 because it did not: (a) disclose detailed information about the Union's claims, acknowledge the pending appeal (b) identify all pending litigations by Union employees for post-petitions violations of the CBA; or (c) **explain newly amended cash flow projections in light of <u>new contracts</u>** and that (d) **it was not propose in good faith because it was designated to eliminate the Union (Exhibit 2, pgs. 6-7)**

f. In regards to the Union's objections to the Joint Plan the BAP concluded that the March 28, 2018 hearing proved: **(Exhibit 2, pgs. 7-9)**
   i. That as of March 28, 2018 there were no claims for damages resulting from the rejection of the CBA. Thus, there is no claim under Class 9.
   ii. That the Minutes reflect that the bankruptcy court considered the effect of the appeal on the feasibility of the Joint Plan.
   iii. That on March 29, 2018 the bankruptcy court entered an order confirming the Joint Plan.
   iv. That the Union did not seek or obtain a stay of the Confirmation pending the resolution of the Appeal.
   v. That therefore, upon the effective date of the Joint Plan, the Debtor and the Co-Debtors commenced making distribution to creditors on or about May 10, 2018.

g. That on July 13, 2018 the Debtor filed the Motion to Dismiss contending that the appeal has become equitable moot. The Debtor asserted among others that: The Union's neglect to obtain a stay… and its deliberate delay of the appellate process has led to the allowance of transactions by the Debtor, its related companies and all the hundreds of creditors of the 3 estates, in reliance on the Rejection Order. If the CBA rejection order would be reverse it would be inequitable, as well as impracticable to undo all of these transactions. **(Exhibit 2, pg. 11)**

h. That the Union opposed the Motion to Dismiss arguing that the Debtor filed it with "unclean hands" because it failed to negotiate a new collective bargaining agreement as directed by the bankruptcy court, and because the bankruptcy court erred in allowing the Debtor to reject the CBA. **(Exhibit 2, pg. 11)**

i. That the Union did not contest any of the Debtor's argument relating to equitable mootness, nor it challenged the Debtors' assertion that the Joint Plan has been

substantially consummated or that the creditors would be adversely affected by reinstating the CBA. **(Exhibit 2, pg. 11)**

j. That the Union did not seek or obtain a stay of the CBA Rejection Order. **(Exhibit 2, pg. 18)**

k. That while the union has dragged his heels throughout the appellate process, the Joint Plan has been substantially consummated and distributions to all of its creditors have commenced. **(Exhibit 2, pg. 18)**

54. The Panel applied the doctrine of equitable mootness standards and concluded that all 4 factors weighed in favor of dismissal of the appeal. **(Exhibit 2, pg. 18)**

55. Under the doctrine of equitable mootness, an appellate court may dismiss a bankruptcy appeal if "unwarranted or repeatedly failure to request a stay enabled development to evolve in reliance on the bankruptcy court order to the degree that their remediation has become impractical or impossible". **(Exhibit 2, pg. 12)**

56. In the bankruptcy content, the doctrine of equitable mootness is based upon the important public policy favoring orderly reorganizations and settlements of debtor's estates by affording finality to bankruptcy court judgements **(Exhibit 2, pg. 13)**

57. The BAP concluded that the Union offered no explanations for its failure to request a stay or for its patterns of delay in the appeal. This factor weight in favor of dismissal **(Exhibit 2, pg. 18)**

58. As to the Union's allegations before the BAP that "it did not need to file a motion for stay pending the appeal because the bankruptcy court "ordered the parties to negotiate a New Collective Bargaining Agreement irrespective of the Appeal process", the BAP concluded that although the minutes reflect that the bankruptcy court granted the request to negotiate a new CBA", authorizing the parties to negotiate which terms the Debtor would impose after rejection of the CBA. Contrary to the Union's assertion, **the bankruptcy court's ruling did not somehow stay the CBA rejection Order or its effects"**. **(Emphasis Supplied) (Exhibit 2, pg. 16)**

59. The Union by its actions and motions granted the Federal Bankruptcy Court the exclusive jurisdiction as to the following controversies which were resolve by the Court. The Regional Director does not have jurisdiction to relitigate them under the principle of collateral estoppel and/or res judicata:

a. IWE's duty to provide the Union information regarding Cardinal and new contracts – Said issue was addressed and resolve by the Court and the BAP **(Exhibits 1, 2, 4, 5 & 6)**

b. The effects of the CBA rejection – The Court's December 7, 2017 decision and order rejecting the CBA resulted in the termination of the entire CBA effective

December 7, 2017, including the articles related to the shop stewards, the representatives' access to the employer's facilities, the grievance and arbitration procedure; the right to a bulletin board in the employer's facility mention in paragraph 9 (a) to (g) of the Consolidated Complaint. The Regional Director does not have jurisdiction to revoke the Court and the BAP decisions rejecting the CBA by forcing IWE to comply with terms that were included in the rejected CBA and which were not in effect as of December 7, 2017 **(Exhibit 1, 2 & 8).**

c. The right granted to IWE by the rejection of the CBA to unilaterally implement the changes included in all its modifications proposal to the Union prior to the Court's December 7, 2017 decision rejecting the CBA (**Exhibit 1, 2 & 8)**

d. IWE's duty to bargain a new collective bargaining agreement – This issued was submitted and resolved by the Bankruptcy Court and the BAP. The Union did not file a Motion in Contempt against IWE to force it to bargain with them in compliance with the March 28, 2018 Court Order; nor appealed the BAP decision regarding IWE's failure to bargain **(Exhibits 1, 2 & 8)**.

e. IWE's duty to deduct the union dues from the payment of the unit employees – The parties reached a good faith impasse due to the Union's intransigence and refusal to bargain with IWE any of the modifications proposed by IWE. Therefore, IWE's duty to continue deducting the union dues and payments ceased after the good faith impasse that resulted in the rejection of the CBA **(Exhibits 1 & 2)**

60. The Union's bad faith failure and refusal to bargain in good faith with IWE the much-needed modifications to the CBA due to the unexpected changes in its economic capacity and obligations as debtor in a chapter 11 proceeding, impedes the union from requesting protection from the Act for matters that were resolved by the Courts and/or should had been brought before the Bankruptcy Court or the BAP (**Exhibits 1 and 2).**

61. In discussing the jurisdiction of the NLRB of matters resolved by the bankruptcy court, it held in *RE HOFFMAN BROS. PACKING CO., INC.* BAP Nos. CC-93-1966-VJH, CC-93-2044-VJH. Bankruptcy No. LA93-23593 BR: "It is plain that at bottom the union is of the view that the NLRB should be the sole arbiter of labor relations matters. However, "The plain meaning of a statute is ordinarily dispositive unless that meaning is contrary to the legislature's intent or would lead to absurd results." *U.S. v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1067 (9th Cir.1994). The drafters of § 1113 clearly meant to grant jurisdiction to the bankruptcy court to modify or otherwise alter the status *quo ante* rights and obligations between a debtor employer and its employees whether they exist under a currently existing CBA or are carried over by agreement or pursuant to the LMRA. To eliminate bankruptcy court jurisdiction or provide for parallel or overlapping jurisdiction by two tribunals would lead to confusion, conflict and costly delay.

62. The Union filed the charges mentioned in paragraph 1 of the Consolidated Complaint with unclean hands and to relitigated matters in which the Bankruptcy Courts have already asserted their exclusive jurisdiction **(Exhibits 1 & 2)**

63. The allegations of the Consolidated violate the rights confer to IWE by the Bankruptcy Courts and the Federal Bankruptcy Code **(Exhibit 1 & 2).**

64. All changes to the CBA were implemented by IWE **AFTER** the rejection of the CBA, and pursuant to the rights confer by section 1113 **(Refer to the dates of the charges filed as mentioned in paragraph 1 of the Consolidated Compliant)**

65. The bankruptcy court reaffirmed in numerous occasions, that the CBA was rejected in its totality since December 7th, 2017 and that said rejection included economic and non-economic clauses. **(Exhibit 1, 4 and 8)**

66. The bankruptcy court had the alternative of: (a) ordering the rejection of the CBA, (b) ordered the modification of the CBA as to only IWE's last proposal; or (c) reject any modification to the CBA. **(Exhibits 1, 4 & 6)**

67. The Court decided to reject the totality of the CBA pursuant to the right and jurisdiction confer by section 1113 of the Bankruptcy Code **(Exhibits 1 & 2)**

68. Most of the alleged unilateral changes mentioned in Paragraph 9 of the Consolidated Complaint were rights granted by the termination of the CBA as of December 7, 2018. All these clauses do not supersede the expiration of an agreement. That is:
    a. Bulletin Boards - **(paragraph 9(a) of the Consolidated Complaint in reference to Article XXV of the rejected CBA)**
    b. Shop Stewards - **(paragraph 9(b) of the Consolidated Complaint in reference to Article VIII of the rejected CBA)**
    c. Inspection Privileges - **(paragraph 9(d) of the Consolidated Complaint in reference to Article IX of the rejected CBA)**
    d. Grievance and Arbitration Procedure - **(paragraph 9(e) of the Consolidated Complaint in reference to Article XII of the rejected CBA)**

69. After the rejection of the CBA IWE continued to recognize the Union as the exclusive representative of its employees after the rejection of the CBA as the following conduct proves:
    a. IWE's Human Resources Director continued to notify the union of all the disciplines imposed to the unit employees after the rejection of the CBA but the Union had not requested to discuss any of the disciplines with IWE **(Exhibit 13, Maricarmen Santiago June 20, 2018 Sworn Statement)**
    b. IWE has continue to arbitrate all the grievances filed by the Union prior and after the rejection of the CBA **(Exhibit 13, Maricarmen Santiago, June 20, 2018 Sworn Statement)**

c. IWE has initiated settlement conversations with the Union's legal counsel and has in fact, settled various cases **(Exhibit 13, Maricarmen Santiago, June 20, 2018 Sworn Statement)**
d. IWE has continue to comply with the seniority rights of its employees as to vacation leaves, overtime assignments and other terms and conditions of employment, provided they are not in content with the right to use temporary or part time employees as propose in its modifications to the CBA **(Exhibit 13, Maricarmen Santiago, June 20, 2018 Sworn Statement)**
e. On July 23 IWE send the Union a letter regarding changes to the positions of cashiers and service representatives **(Exhibit 14)**
f. The Union replied on July 27 that it had no objection to said changes. **(Exhibit 15)**

70. IWE in compliance with the Act, continued to honor the seniority of the unit employees for purposes of overtime assignments, job opening, work schedules, work assignments and vacations in compliance with the Act and the rights confer by the Federal District Court for the District of Puerto Rico in case In Re: P.J. ROSALY ENTERPRISES, INC., Case No. 16-07690 **(Exhibit 13, Maricarmen Santiago, June 20, 2018 Sworn Statement)**.

71. On September 20th, 2018 the Honorable Enrique S. Lamoutte of the United States Bankruptcy Court of the District of Puerto Rico reaffirm and restated in case In Re: P.J. ROSALY ENTERPRISES, INC., supra, that the totality of the CBA has been rejected on December 7, 2017 and that it no longer existed **(Exhibits 16 (a) and (b)).**

72. Specifically, the Court reaffirm the following as to IWE's bargaining obligations after the Court's December 7th, 2016 Order rejecting the CBA: *This Honorable Court already stated* ***that it has no jurisdiction to Order the Debtor to make union dues deductions upon the rejection of the CBA in its entirety****. The Court was clear when it denied the Union's prior request. It stated in open court as follows:* **(Exhibits 16 (a) and (b)).**

a. ***The bankruptcy court does not have authority to order a chapter 11 debtor, after rejection of the CBA, to make employee Union quota deductions****. In re: San Rafael Baking Co., 219 BR 860 (9th Cir. BAP 1998).*

b. *A review of this Court's order, particularly the last paragraphs, show that the court rejected the CBA in its entirety.* ***There were no qualification, conditions or exceptions.*** *(Our Emphasis)*

c. *It should be noted that the Union appealed the Opinion and Order granting the rejection of the collective bargaining agreement to the Bankruptcy Appellate Panel for the First Circuit ("BAP") and such appeal was dismissed. It had the opportunity to seek revision of the BAP's determination to the First Circuit Court of Appeals and yet it chose not do so.*

d. ***Thus, the law of the case is that the collective bargaining agreement was rejected in toto and it is no longer in vigor. This has been recognized by this Honorable Court and by the BAP.***

e. ***The Union is claiming here, and before the NLRB, "alleged rights" under the rejected collective bargaining agreement in an attempt to revive contractual obligations of the Debtor that no longer exist. This is an attempt to revisit matters that have already been resolved and adjudicated by this Honorable Court in the Opinion and Order granting the rejection of the collective bargaining agreement. The ruling of this Honorable Court is final and not subject to further appeals.*** *Any alleged "fear" and "harm" is of the Union's own making.*

f. ***It is the Union who has gone with unclean hands to the NLRB and before this Honorable Court.*** *The Union and its counsel are very well aware that it has already sought before the NLRB the same remedies it is seeking before this Honorable Court and that such proceedings are ongoing. It now seeks to tarnish the image and reputation of the Debtor before this Honorable Court stating that the Debtor lacks good faith.*

III. SUMMARY JUDGEMENT IS APPROPIATE SINCE THE ALLEGATIONS DO NOT REPRESENT AN ISSUE OF MATERIAL FACT

Summary judgement of an unfair labor practice charge is appropriate under section 102.24 (b) of the NLRB's Rules and Regulations where the merits of the Complaint can be decided upon legal grounds and/or undisputed facts. In this case the allegations of the Consolidated Complaint either refer to matters outside the NLRB jurisdiction that must be dismiss as a matter of law or that can be dismiss notwithstanding any non-material factual disagreements.

a. THE CBA WAS TERMINATED IN ITS ENTIRELY BY THE FEDERAL BANKRCUPTY COURT'S DECEMBER 7, 2017 DECISION AND ORDER REJECTING THE CBA

It is evident from the December 7, 2017 Opinion and Order of the Federal Bankruptcy Court for the District of Puerto Rico in case *PJ Rosaly Enterprises,* Case no. 16-07690 that the Court rejected the totality of the CBA, which resulted in the termination of the entire CBA as of December 7, 2017 (See **Exhibit 1**). That the rejection of the CBA was the result of a good faith impasse between the parties after the bargaining of **ALL** the modifications to the CBA proposed

by IWE **(Exhibit 1, 2 & 3)**

This undisputed fact was confirmed by the Bankruptcy Court on March 28, 2018 and later by the BAP in its July 24, 2018 decision dismissing the Union's appeal as to the rejection of the CBA (See **Exhibits 2 & 8**)

Moreover, as recent as September 20, 2018 the Hon. Judge Lamoutte of the Puerto Rico Federal Bankruptcy Court reaffirmed the finality of its December 7, 2017 decision and the termination of IWE's obligations under the rejected CBA **(Exhibit 16 (a) and (b))**

Henceforth the termination of the CBA was not limited to the provisions mentioned in paragraph 6(b) of the Consolidated Complaint. It extended to ALL of IWE's obligations under the rejected CBA.

Moreover, the termination of the CBA is even recognized by the Regional Director in the allegations of paragraph 10 of the Consolidated Complaint by imposing to IWE the obligation to bargain with the Union the successor collective bargaining agreement of the rejected CBA.

This uncontested fact is contrary to the allegations of paragraph 9 of the Consolidated Complaint made under the erroneous presumption that the CBA was only modified as to the provisions mentioned in paragraph 6 (b) of the Consolidated Complaint and that the rest of the CBA continue in full force and effect. Therefore, based on this allegation any deviation by IWE of the any of the other terms of the CBA constituted a violation of the Act. This presumption by the Regional Director in the Consolidated Complaint is undisputedly and clearly contrary to the multiple decisions of the Bankruptcy Courts which is the applicable law in this case. **(See Exhibit 1, 2, 8 & 16)**

Henceforth, although under the Act some obligations supersede the termination of a contract, none of them include the rights of the shop stewards, the right to bulletin boards within the employer's facilities, the right to a grievance and arbitration procedures continuance nor to the right to unlimited and uncoordinated access by the union representatives to the employer's facilities. All of these rights are constrained to the effectiveness of the contract that granted them.

In *LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC. v. NATIONAL LABOR RELATIONS BOARD ET AL.*; 501 U.S. 190 (1991) the Court held: The law compels a party to submit his grievance to arbitration only if he has contracted to do so. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974). We reaffirm today that under the NLRA arbitration is a matter of consent, and that it will not be imposed upon parties

beyond the scope of their agreement. In the absence of a binding method for resolution of post expiration disputes, a party may be relegated to filing unfair labor practice charges with the Board if it believes that its counterpart has implemented a unilateral change in violation of the NLRA. If, as the Union urges, parties who favor labor arbitration during the term of a contract also desire it to resolve post expiration disputes, the parties can consent to that arrangement by explicit agreement.

Moreover, *In re Trump Entertainment Resorts*, 810 F3d 16, 20915 LRRM 3201 (2016) the Third Circuit noted that "section 1113 made no mention of a debtors' continuing statutory obligation under the Act to maintain the status quo with respect mandatory subjects of bargaining until the debtor weather reaches agreement or impasse. The Court also noted, however that section 1113 does not restrict itself to executory or unexpired contracts".

As previously stated herein, the rejection of the CBA under section 1113 of the Bankruptcy Code is the sad outcome when a union and an employer cannot come to terms similar to a good faith impasse *Bohack,* 541 F 2d. at 318.

In regards to the seniority rights violations, IWE's Human Resources Director testified that they had continue to respect the seniority rights of the employees in overtime assignments and vacation scheduling. In fact, when asked the alleged employees whose seniority was not respected, the Regional Director was only able to identify only **ONE** employee from the **231 employees** currently in the unit. This **ONE** employee includes all of IWE's five terminals. Clearly said deviation cannot be consider an intentional deviation of the employees' seniority rights as alleged by the Regional Director in paragraph 9 (c) of the Consolidated Complaint but rather an unforeseen mistake that does not amount to an issuance of a Complaint.

Lastly, in *In re Northwest Airlines Corp*., 366 B.R. 270 (Bankr S.DN.Y. 2017) the court held that Section 1113 rejection is not a tentative step to be confirmed at a later stage of the bankruptcy case, but a final act that has immediate consequences. There is no indication …that a rejection order can be subject to reconsideration nine (9) months after the contract has been rejected".

Therefore, Paragraph 9 of the Consolidated Complaint must be dismissed.

b. IWE HAD NO OBLIGATION TO CONTINUE THE DEDUCTION OF UNION DUES AS THE RESULT OF THE GOOD FAITH IMPASSE REACHED BY THE PARTIES

The Board recently has held that an employer is obligated to continue the union dues deduction and payment after the termination of a contract, contrary to their previous decisions. However, said obligation terminates when the parties reached a good faith impasse and said impasse is caused by the Union, as the record shows in this case (**Exhibits 1, 2 and 16)**. Specifically, the Bankruptcy Court in its December 7, 2017 Opinion and Order held the following as to the union's intransigence that move the court to reject the CBA and created the good faith impasse that allowed IWE to ceased deduction the union dues from the employees' salaries:

i. **The Union refused to accept the Debtor's proposal**. (**Exhibit 1, Pg. 22**)
ii. **The evidence before the court shows that it is unlikely that the Union would have been willing to accept <u>any</u> proposal from the Debtor**. (**Exhibit 1, Pg. 22**)
iii. Lucas Alturet, a Union service representative, testified that the Union rejected the proposal because it understood it had already negotiated and made substantial concessions in August 2016. (**Exhibit 1, Pg. 22**)
iv. This is further evidenced by the fact that the Union never made a counter-proposal to the Debtor. (**Exhibit 1, Pg. 22**)
v. This court does not dispute that the Union made substantial concessions or minimize the same. However, **<u>the Union could not refuse to compromise once the Debtor filed for Bankruptcy and invoked its rights under section 1113</u>**. (**Exhibit 1, Pg. 22**)
vi. Thus, the **court concludes that the Union did not have "good cause" to reject the proposal.** (**Exhibit 1, Pg. 21**)

Moreover, the imposition of the payment of the union as a penalty to IWE would constitute a remedy in damages for the rejection of the CBA which is not allowed by the federal Bankruptcy Code. Any economic liability may affect the Plan Confirmation payments and third right creditor's rights.

Lastly, the BAP confirmed that any change in the rejection of the CBA could affect IWE's capacity to comply with the payments to third party creditors and should not be permitted (**Exhibits 2 & 16).**

c. IWE DID NOT HAD THE OBLIGATION TO BARGAIN WITH THE UNION

Section 2 of Article XXXIX of the rejected CBA required that the party who wished to modify the CBA, had to notify the other party in written, personally or by certified mail its intention modify the CBA, with at least ninety 90 days prior to the expiration of the CBA **(Exhibit 17, only pg. 77)**.

The Union's April 9, 2018 letter did not comply with the requirements agreed by the parties **(Exhibit 9).**

a. The Union send the notice by email. Not personally nor by certified mail as required.
b. The Union's notice was premature –
    a. The rejected CBA was supposed to end on September 30, 2019 (See paragraph 5(c) of the Consolidated Complaint).
    b. The union appealed the decision rejecting the CBA before the BAP.
    c. At the time the union send their April 9th letter to IWE the BAP has not issued its decision.
    d. Therefore, the rejection of the CBA was not final although it was effective since December 7, 2017 because the union failed to request a stay.
    e. Henceforth, the Union's April 7th, 2018 letter was made more than ONE (1) year before the CBA's effective date was supposed to end.
c. The Union did not request to modify the CBA but to bargain a New collective bargaining agreement.

IWE did not waived its right to the notice as required by the rejected CBA *Sawyer Stores*, 190 NLRB 651, 77 LLRM 1434 (1971). At all times IWE objected the defection of the April 9, 2018 union's notice.

Moreover, to initiate the bargaining of a successor collective bargaining agreement would have attempted against IWE's reorganization unnecessary by forcing IWE to incur in the expenses and time-consuming efforts related to the bargaining a new contract, under the possibility that the BAP could revoke the court's December 7, 2017 decision rejecting the CBA. IWE did not refuse to bargain with the union. But instead requested the Union to either withdraw its appeal or wait for the BAP's decision **(Exhibit 10)**.

Therefore, paragraph 10 of the Consolidated Complaint must be dismiss.

d. IWE DID NOT VIOLATE ITS DUTY TO FURNISH INFORMATION

The National Labor Relations Act (the "Act"), 29 U.S.C. §§ 151-163, does not contain an express requirement that unions or employers provide each other with information to facilitate collective bargaining. Rather the obligation to provide information to a union arises from the Act's "collective bargaining" obligation. 29 U.S.C. §158(d).

In *NLRB v. Truitt Mfg Co.* 351 U.S. 149 (1956) the Supreme Court first recognized the

general obligation of an employer to provide information that is required by a bargaining representative for the proper performance of its duties. However, one of the key principals developed from this case is that the duty to supply information under the NLRA depends upon "the circumstances of the particular case." *Id.* 351 U.S. at 153 (1956).

This duty does not operate on its own, and it is triggered only after a request or demand has been made for certain information held by the employer. *NLRB v Boston Herald Traveler Corp.*, 210 F.2d 134 (1st Cir. 1954). Even though the NLRB and courts grant the scope or subject of the union's request substantial leeway, the information requested must be **relevant** and made in **Good Faith**.

Merely asserting that the information is "necessary" to represent the employees intelligently, is insufficient to establish relevance. *Soule Glass & Glazing Co. v. NLRB,* 652 F.2d 1055, 1099 (1st Cir. 1981). Likewise, when a union has a vague or speculative explanation for its request of information, the NLRB has determined that an employer need not furnish the information requested. *Rice Growers Ass'n of Cal.,* 312 NLRB 837, 144 LRRM 1178 (1993) (denying the union's request for a copy of the employer's sales and distribution contract with its parent corporation). **The union's explanation of relevance must be made with some precision as a generalized, conclusory allegation is insufficient**. *Disneyland Park*, supra. Thus, the union's first hurdle for requesting information from an employer is establishing that the information sought is relevant. Certain information will have to be shown to be relevant, whereas information central to the employer/employee relationship is presumptively relevant.

Hence, once the union has made a request, it must then demonstrate how that the information the union is seeking is relevant to the employer/employee relationship.

On the other hand, if the employer can show that the union's information request is made in bad faith, **then there is no obligation to supply the requested information**. *NLRB v. Wachter Construction*, 23 F.3d 1378 (8th Cir. 1994), rev'g 311 NLRB 215, 143 LRRM 1181 (1993) (union requests for subcontracting information were made in bad faith to harass the employer into contracting only with unionized contractors)

The Union's April 9th, 2018 letter only stated: "For purpose of the bargaining, we request everything related to the operation of Cardinal and any other new contract" **(Exhibit 12).** Said request was beyond the employer's obligation under the Act. What entitles "everything related to the operation of Cardinal and any new other new contract"? Does it mean that IWE had to

provide the Union detail documentation of all the employees used to provide this specific clients' services, operational structure and similar, as well as the terms of their contractual relations and the list continues?

Also, the mere justification that "For purposes of bargaining" does not satisfy the relevant requirement. Moreover, in the absence of a snap-pack provision limitation as to the rejection of the CBA, the information regarding Cardinal and new contracts confirms the irrelevancy of said information.

As previously stated, IWE is the only Puerto Rican courier service provider in an extremely competitive industry, dominated by UPS, USPS, Fed-Ex, DHL and other large American companies. In this industry a $0.01 can be the difference between retaining a client or losing it, because the contracts are mostly based on volume. The Union represents employees in UPS, DHL, Fed-Ex and similar. In fact, the UPS unit is the largest unit of the Union.

The Union's bad faith as to the use for the confidential information requested supports IWE's position. It is the same reason IWE require the union to sign a confidentiality agreement as a pre-condition to provide them the same information requested during the bankruptcy proceedings. Especially when during the November 8th, 2017 evidentiary hearing the Union through its secretary-treasurer testified that the union refused to sign the confidentiality agreement because he was unwilling to protect the information from competitors (Exhibit 6). Under said circumstances the Judge denied the Union's request of information. Therefore, it is evident that the Union was trying to rig the system and pretended by its April 9th letter to obtain the confidential information without the signing of a confidentiality agreement.

The mere refusal of the Union to sign a confidentiality agreement during the bankruptcy proceedings to access the information of Cardinal and of the other IWE's clients' supports IWE's denial to provide the union said information.

Also, the testimony of the union's secretary-treasurer during the November 8th, 2017 hearing stating that the union was not willing to protect the confidential information from competitors, supports IWE's position to deny them under the Act the confidential information regarding Cardinal and IWE's other clients. under the Act. Especially when financial information of IWE and the revenues from all its clients has and is available to the Union in the Joint Plan and its amendments **(Exhibit 7).** This was precisely the conclusion made by the bankruptcy court when it issued its decision denying the union's request of the confidential information regarding Cardinal

and IWE's other clients **(Exhibits 6 & 8).** Henceforth, all of IWE's economic obligations are included in detail in the Plan Confirmation and Joint Plan. The Union, as creditor of IWE has ample access to the Joint Plan, its amendments and the Confirmation Plan **(Exhibit 2)**.

In addition, it has been established that the Board would not find a violation of the duty to furnish where the union's information request comes after a good faith impasse and appears to serve no purpose. *IN ACF Indus.*, LLC, 347 NLRB 1040, 180 LRRM 1303 (2006).

Based on the undisputed facts herein the allegations of paragraph 11 of the Consolidated Complaint must be dismiss. It has been established that the Union's April 9th, 2018 request of information did not comply with the requirements required by the Board. Therefore, IWE did not had the duty to furnish the confidential information regarding Cardinal and its other clients.

e. The CONSOLIDATED COMPLAINT MUST BE DISMISS UNDER THE PRINCIPLE OF RES JUDICATA AND/OR COLLATERAL ESTOPPEL

1. The Res judicata and collateral estoppel principle applicable to both of these charges

In addition, as previously stated, it is also our position that the NLRB does not have jurisdiction under the principles of res judicata and collateral estoppel to revoke or amend the Bankruptcy Court decision ordering the rejection of the CBA and/or to amend or revoke the Joint Plan Confirmation approved by the creditors and ordered by the Bankruptcy Court.

Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). The courts will apply res judicata and collateral estoppel to agency adjudicatory decisions when the adjudication resolves "disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate". *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966).

In regard to the allegations in the Consolidated Complaint the content of the Bankruptcy courts 'orders included herein as Exhibits 1, 2, 8 and 16 evidence that they passed judgment over the rejection of the CBA, IWE's duty to provide the Union information regarding Cardinal and its other clients as well as to IWE's obligation to bargain a successor collective bargaining agreement. As to these issues each party had the opportunity to submit evidence; both parties vigorously defended its position; hearings said controversies were held under the Bankruptcy Code.

The Bankruptcy Court had competent jurisdiction to issue a ruling as to the request made by IWE to reject the CBA and its effects. It is undisputed that Section 1113 and Chapter 11 of the Bankruptcy Code conferred to the Bankruptcy Court the power and competent jurisdiction to reject the CBA. Moreover, the Union submitted to the Bankruptcy courts the issues as to IWE's obligation to bargain a new collective bargaining agreement as well as to IWE's duty to provide them the information regarding Cardinal and its clients absent a confidentiality agreement.

Hence the allegations of the Consolidated Complaint must be dismissed for lack of jurisdiction under the principle of res judicata.

Moreover, even if the NLRB determines that the principle of Res Judicata is not be applicable as to the Consolidated Complaint, there is an issue of preclusion based on collateral estoppel that cannot be denied.[1]

The doctrine of collateral estoppel, also known as issue preclusion, precludes the relitigating of an issue that has been conclusively resolved by one tribunal in a second forum that is considering a different but related dispute. While the doctrine of collateral estoppel is currently viewed as an application of the doctrine of res judicata, the two doctrines had very different origins. Res judicata evolved from Roman law and provides that a prior judgment is conclusive in a second action that involves the same parties and the same claim. Application of res judicata serves, and is motivated by, the goal of finality in litigation. Res judicata also serves the goals of judicial economy, fairness to litigants and preservation of the prestige of the courts by preventing inconsistent judgments on the same claim.[2]

On the other hand, collateral estoppel, is of Germanic origin, and was based on the principle that the parties' actions in the earlier adjudication created an estoppel in the later litigation. Despite the difference in origin, collateral estoppel serves the same goal as res judicata. This is, finality, fairness, judicial economy, and judicial prestige. The doctrine preserves the finality of judgments and conserves judicial resources by preventing relitigating an issue that was decided in prior litigation, even if the earlier litigation involved a different cause of action. In the second action,

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[1] *See Migrav. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 77 fn. 1 (1984) (explaining that the application of *res judicata* in a "narrow sense" refers only to claim preclusion, which forecloses relitigating matters that should have been raised in an earlier action but were not, while collateral estoppel, or issue preclusion, refers to the effect of a judgment in foreclosing relitigating of a matter that has already been decided)

[2] Ann C. Hodges, *The Preclusive Effect of Unemployment Compensation Determinations in Subsequent Litigation: A Federal Solution*, 38 Wayne L. Rev. 1803 (1992).

additional litigation is permitted only on those issues being raised for the first time.[3]

The court's decisions included as exhibit 1, 2, 8 and 16 evidence that no new issue has been raised that precludes the application of the doctrine of collateral estoppel as to the referred to allegations in the Consolidated Complaint.

Under general principles of collateral estoppel, a judgement is a prior processing that bars a party from relitigating an issue if:

> (1) The issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.

Collateral estoppel increases fairness to litigants by allowing the parties to rely on original determinations to guide their future behavior. Otherwise, a losing litigant could extend a particular action indefinitely by relitigating in hopes of a favorable decision. If the Consolidated Complaint is not dismissed partially or totally by the Board, it would defeat of the purpose of section 1113 of the Bankruptcy Code. Additionally, the principle of collateral estoppel exists to limit repetitive actions and enables the judicial system to function efficiently.[4]

The applicable test to determine whether res judicata bars litigation of a claim is: (1) whether the prior judgment was rendered by a court of competent jurisdiction; (2) whether the judgment was a final judgment on the merits, and (3) whether the same cause of action and same parties or their privies were involved in both cases. *De Llano v. Berglund*, 183 F.3d 780, 781 (8th Cir.1999) (citation omitted).

It is uncontested that all the requirements are met (refer to Exhibits 1, 2, 8 and 16). Especially when the Union never questioned the Court's jurisdiction to reject the CBA under section 1113 of the Bankruptcy Code (See Exhibit 2). The Union only questioned the legality of the Court's December 7, 2017 rulings under the factors required by section 1113 (Exhibit 2).

Therefore, the re-litigation of the allegations as to the rejection of the CBA and its effects; IWE's duty to provide the Union the information regarding Cardinal and its clients absent a confidentiality agreement and IWE's duty to bargain with the Union a successor collective

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[3] *Id*.

[4] Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line, David A. Brown, Cornell Law Review Volume 73, Issue 4 May 1988.

bargaining agreement are barred by the doctrine of collateral estoppel and must not be permitted.

IV. CONCLUSION

The allegations in the Consolidated Complaint t do not present any genuine issues as to material facts. As such, this case can be decided totally or partially as a matter of law and the Consolidated Complaint should be dismissed. IWE seeks an Order dismissing the Consolidated Complaint and vacating the hearing.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico, this 7th day of January 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this same date a true copy of this document has been send by email to Isabel Bordallo, Representative, Union de Tronquistas de PR, Local 901, IBT by email to tronquistalu901@gmail.com and to the Regional Director through Mrs. Garcia, Vanessa, Officer in charge of Sub-Region 24 by email to Vanessa.Garcia@nlrb.gov.

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